Pilecon Industrial Engineering Sdn Bhd v Maxson Resources Ltd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1–24–34 OF 2000
ABDUL AZIZ J
29 SEPTEMBER 2001

Arbitration *— Agreement — Interpretation of — Venue for arbitration — Dispute as to venue — Whether serious question to be tried justifying grant of interlocutory injunction to stay proceedings before arbitrator — Plaintiff proceeded with arbitration under protest, whether amounted to consent to arbitration*

The plaintiff, a Malaysian company, was engaged to supply and install certain electrical services in Hong Kong. By Works Order No 098/98, the plaintiff appointed Maxson, the defendant, as subcontractor for the project. Clause 16 of the general conditions ('cl 16') provided that any dispute or difference arising out of the contract shall be referred to arbitration, which shall be deemed to be a submission to arbitration within the meaning of the Arbitration Ordinance 1950 or any statutory modification thereof for the time being in force. Subsequently, disputes arose between the parties and the defendant propose for the dispute to be heard before an arbitrator appointed under the Arbitration Ordinance (Cap 341) of Hong Kong ('Cap 341'). The defendant proceeded under Cap 341 because it construed the words 'Arbitration Ordinance 1950' in cl 16 as a reference to Cap 341 and not to any Malaysian statute. The plaintiff's stand was that the statute intended in cl 16 was a Malaysian statute. The plaintiff applied for an interlocutory injunction to restrain the defendant from proceeding further in the arbitration in Hong Kong pending the disposal of the plaintiff's originating summons in this case.

Held, allowing the application:

(1) The basic dispute between the parties concerning the arbitration was as to the interpretation of cl 16, in particular the statute mentioned therein, whether it referred to the statute on arbitration of Hong Kong or Malaysia. This question was a serious question to be decided on the originating summons on the question of the venue of the arbitration and the governing law. The balance of convenience clearly laid in favour of granting the injunction (see pp 222F–G, 230A).

(2) The purpose of the interlocutory injunction was to ensure that the arbitration did not commence until the originating summons was decided, but when the date of hearing of the arbitration came earlier than the date of hearing of the originating summons, the plaintiff attempted to prevail upon the arbitrator and the defendant to agree to an adjournment of the hearing of the arbitration. It was when the plaintiff saw no hope for an

adjournment from the arbitrator that the plaintiff filed for an ex parte interlocutory injunction. The plaintiff did that soon enough after the arbitrator's final decision. In that light, there was no delay in its part (see p 228A–E, G). A

(3) The plaintiff had under protest and while objecting to the Hong Kong venue for the arbitration and to the appointment of the arbitrator, took part in the arbitration by, for example filling their statement of defence and counterclaim because if the plaintiff failed to do so, it would be prejudiced in the arbitration should it fail on its originating summons. The plaintiff's participation was under protest and was a necessity to protect its interest. It could not be construed as consent to the arbitration on Hong Kong or the appointment of the arbitrator (see p 228C–D, H). B C

[**Bahasa Malaysia summary**

Plaintif, sebuah syarikat Malaysia, terlibat dalam pembekalan dan pemasangan perkhidmatan elektrik tertentu di Hong Kong. Melalui Pesanan Kerja No 098/98, plaintif telah melantik Maxson, defendan, sebagai subkontraktor projek tersebut. Klausa 16 syarat-syarat am ('kl 16') memperuntukkan bahawa apa-apa pertikaian atau perbezaan yang timbul daripada kontrak hendaklah dirujuk kepada timbangtara dan dianggap sebagai tertakluk kepada timbangtara dalam maksud Ordinan Timbangtara 1950 atau apa-apa perubahan statutori yang berkuatkuasa pada masa itu. Berikutan itu, pertikaian telah timbul antara pihak-pihak dan defendan mencadangkan agar pertikaian didengar di hadapan seorang penimbangtara yang dilantik di bawah Ordinan Timbangtara (Bab 341) Hong Kong ('Bab 341'). Defendan memulakan tindakan di bawah Bab 341 kerana ia menafsirkan perkataan-perkataan 'Ordinan Timbangtara 1950' dalam kl 16 sebagai satu rujukan kepada Bab 341 dan bukan mana-mana statut Malaysia. Pendirian plaintif adalah bahawa statut yang ingin digunakan dalam kl 16 adalah satu statut Malaysia. Plaintif sekarang memohon untuk satu injunksi interlokutori untuk menyekat defendan daripada memulakan prosiding selanjutnya dalam timbangtara di Hong Kong sementara menunggu saman pemula plaintif selesai dalam kes ini. D E F G

Diputuskan, membenarkan permohonan tersebut:

(1) Asas pertikaian antara pihak-pihak tersebut tentang timbangtara adalah berhubung penafsiran kl 16, khususnya statut yang disebutkan, iaitu sama ada ia merujuk kepada statut tentang timbangtara Hong Kong atau Malaysia. Persoalan ini adalah satu persoalan yang serius yang perlu diputuskan atas saman pemula tersebut berhubung persoalan tentang tempat timbangtara dan undang-undang yang berkuatkuasa. Imbangan kemudahan dengan jelas menyebelahi pemberikan injunksi (lihat ms 222F–G, 230A). H I

(2) Tujuan injunksi interlokutori adalah untuk memastikan bahawa timbangtara tidak bermula sehingga saman pemula tersebut diputuskan, tetapi apabila tarikh perbicaraan timbangtara tiba lebih awal daripada tarikh saman pemula tersebut, plaintif telah cuba untuk memujuk penimbangtara dan defendan agar bersetuju menangguh perbicaraan timbangtara tersebut. Apabila plaintif menyedari tiada harapan untuk mendapat satu penangguhan daripada penimbangtara, plaintif telah memfailkan satu injunksi interlokutori ex parte. Plaintif berbuat demikian sejurus selepas keputusan muktamad penimbangtara. Oleh itu, tiada kelewatan di pihaknya (lihat ms 228A–E, G).

(3) Plaintif dengan bantahan dan semasa membantah akan tempat di Hong Kong untuk timbangtara tesebut dan terhadap pelantikan penimbangtara, telah turut-serta dalam timbangtara tersebut dengan, sebagai contoh, memfailkan pernyataan pembelaan dan tuntutan balasnya kerana jika plaintif gagal berbuat demikian, ia akan memprejudiskan penimbangtaraan tersebut jika ia gagal dalam saman pemulanya. Penyertaan plaintif adalah dengan bantahan dan adalah menjadi keperluan untuk melindungi kepentingannya. Ia tidak boleh ditafsirkan sebagai membenarkan timbangtara di Hong Kong atau pelantikan penimbangtara tersebut (lihat s 228C–D, H).]

Notes

For cases on arbitration agreement generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 862–891.

Legislation referred to

Arbitration Ordinance (Cap 341) [HK]
Arbitration Ordinance (Extension) Order 1972
Arbitration Ordinance 1950 (No 12 of 1950)
Arbitration Ordinance of Sabah (Sabah Cap 7)
Arbitration Ordinance of Sarawak (Sarawak Cap 45)
Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) s 3(2) [HK]
Malaysia Act 1963 s 74
Revision of Laws Act 1968
Sarawak Ordinance No 5 of 1952

Edwin Lim Hock Lee (KL Wong with him) (*Edwin Lim & Co*) for the plaintiffs.

Hor Ai Sin (*Tan Swee Im & Co*) for the defendants.

Abdul Aziz J: This was an application by the plaintiffs ('PIE'), a Malaysian company, for an interlocutory injunction to restrain the defendants ('Maxson'), a Hong Kong company, from proceeding further in an

arbitration in Hong Kong pending disposal of the plaintiffs' originating summons in this case.

PIE had to supply and install certain electrical services at Tai Po Road, Hong Kong. On 27 October 1998, by Works Order No 098/98, they appointed Maxson as subcontractor for the project. Clause 16 of the General Conditions ('cl 16') provided as follows:

> Any dispute or difference arising out of this contract shall be referred to arbitration of a person to be mutually agreed upon between the contractor and the company, failing agreement, to some person appointed on the application of either parties to the contract by the person named in the WO. This shall be deemed to the [sic] submission to arbitration within the meaning of the Arbitration Ordinance 1950 or any statutory modification thereof for the time being in force.

Subsequently, disputes arose between the parties. Maxson claimed that PIE owed them HK$4,615,316.21 for what they had provided under the Works Order. On 6 March 2000, Maxson's solicitors, Lovells, a Hong Kong firm, wrote to PIE to say that as Maxson had been pressing for payment for a considerable period of time, a dispute existed between PIE and Maxson in respect of Maxson's entitlement to payment and that the dispute 'is hereby referred to arbitration' pursuant to cl 16. Lovells invited PIE to consent to the appointment of Mr Bruce Humphrey as arbitrator. They said that if PIE did not consent or propose an acceptable candidate within seven days, an application would be made to the Hong Kong International Arbitration Centre ('HKIAC') pursuant to the Arbitration Ordinance (Cap 341) of Hong Kong ('Cap 341') for the appointment of an arbitrator.

The reason why, relying on cl 16, Maxson were proceeding under Cap 341 was because they construed 'Arbitration Ordinance 1950' in cl 16 as a reference to Cap 341 and not to any Malaysian statute. And the reason why, proceeding under Cap 341, they would need to apply to the HKIAC to appoint an arbitrator was because in their view, cl 16 did not identify the appointing authority. These reasons were to be subsequently revealed in a letter of Lovells' to the HKIAC dated 6 April 2000, which I shall mention again later.

PIE replied to Lovells on 7 March 2000 denying Maxson's claim and disputing its correctness. They countered the claim with a claim of HK$27,438,752 as liquidated damages for losses allegedly suffered by them as a result of Maxson's alleged failure to complete the project within the stipulated time. PIE maintained that 'Arbitration Ordinance 1950' referred to a Malaysian statute and therefore the appointment of an arbitrator should be done according to the Malaysian statute. So they did not agree to the appointment of Mr Bruce Humphrey.

I would mention at this juncture that according to PIE, the Works Order was a standard form of theirs which they had been using with identical terms and conditions in contracting with many other companies for various projects in Malaysia (this was said by them in their affidavit in support of the originating summons in this case that they were subsequently to file).

A I would also mention at this juncture that from a little research that I did, it would appear that before 1 November 1972 there were three Arbitration Ordinances in force in the different territories of Malaysia, namely the Arbitration Ordinance 1950 (No 12 of 1950) of the Federation of Malaya, in force in the States of Malaya, the Arbitration Ordinance of Sabah (Sabah Cap 7), in force in the State of Sabah, and the Arbitration B Ordinance of Sarawak (Sarawak Cap 45) which had been enacted as Sarawak Ordinance No 5 of 1952, in force in the State of Sarawak. So before 1 November 1972, the arbitration statute in force in the States of Malaya was the Arbitration Ordinance 1950. By the Arbitration Ordinance (Extension) Order 1972 made under s 74 of the Malaysia Act 1963 and C published on 8 June 1972, the Arbitration Ordinance of Sarawak was extended to apply throughout Malaysia, and the Federation of Malaya and Sabah Ordinances were repealed. That had effect on 1 November 1972. The Arbitration Ordinance of Sarawak, as extended to apply throughout Malaysia, was revised under the Revision of Laws Act 1968 and the revised statute became Act No 93 in the Laws of Malaysia series, and was given the D short title of Arbitration Act 1952. The year 1952 was given presumably because the Sarawak Ordinance was a 1952 Ordinance.

On 21 March 2000, Lovells applied to the HKIAC for the appointment of an arbitrator. The application was said to be made 'pursuant to the Arbitration (Appointment of Arbitrators and Umpires) Rules appended to Ch 41'.

E On 23 March 2000, the HKIAC referred the application to PIE, whose solicitors, on 30 March 2000, gave a reply in which they maintained that according to cl 16, the arbitration should be conducted in Malaysia in accordance with the laws of Malaysia and that the 'Arbitration Ordinance 1950' in cl 16 referred to a Malaysian statute.

F On 6 April 2000 Lovells responded by writing to the HKIAC to state Maxson's stand as regards cl 16. This is the letter of Lovells' that I mentioned earlier, when I set out their stand.

On 20 April 2000, the HKIAC wrote to Lovells to say that they had formed the view that Maxson had established a prima facie case that cl 16 was an agreement to arbitrate in Hong Kong, and that since the Works G Order did not name the person to appoint the arbitrator, the HKIAC would now proceed with the appointment of an arbitrator. This was followed by a letter from the HKIAC dated 8 May 2000 to Lovells and PIE's solicitors saying that they had Mr Anthony Houghton in mind as arbitrator and that they would appoint the arbitrator on 22 May 2000, and asked that H comments be made before that date.

On 19 May 2000, PIE's solicitors replied to the HKIAC saying, inter alia, that PIE objected to the appointment of Mr Anthony Houghton and would oppose the convening of arbitration proceedings in Hong Kong.

On 23 May 2000, the HKIAC informed Lovells and PIE's solicitors that Mr Anthony Houghton had been appointed arbitrator, and on the I same date, Mr Anthony Houghton ('the arbitrator') wrote to Lovells and PIE's solicitors to confirm his acceptance of the appointment. He requested the parties for their proposals as to the further conduct of the arbitration.

Lovells responded on 24 May 2000. They set out certain directions as regards pleadings and the sending of pleadings to the arbitrator which they proposed that the arbitrator issue. PIE's solicitors responded on 25 May 2000. As to Lovells' proposed directions, they said 'our solicitors have advised us that we ought not in any way participate, as otherwise our participation may be construed as a waiver of our rights to appoint an arbitrator in Malaysia'.

On 26 May 2000, PIE's solicitors forwarded a copy of the originating summons in this case to the arbitrator. On the same date, PIE's solicitors wrote another letter to the arbitrator to enquire as to where the HKIAC derived their authority to appoint an arbitrator unilaterally, that is, in face of objections by PIE. The arbitrator replied in a letter dated 27 May 2000 to Lovells and PIE's solicitors. He explained that by an amendment to Cap 341 in 1997, the HKIAC were empowered to appoint an arbitrator where the parties were unable to agree on the identity of the arbitrator. Responding to the letter of PIE's solicitors dated 25 May 2000, he said that he would allow PIE a few days to consider their position, and if he did not hear further in regard to the directions proposed by Lovells by the end of the month, he proposed to issue directions in accordance with Lovells' proposals. On 27 May 2000 the originating summons was filed. It sought declarations to the effect that the arbitration should be conducted in Malaysia according to Malaysian law.

The facts and events that I have set out and that I shall be setting out in continuation shortly are gathered mainly from documents, mostly correspondence, exhibited to affidavits referred to in submission on the interlocutory injunction application. The facts are intended to show the events leading to the filing of the originating summons and of the injunction application, the reasons for their filing and the nature of the dispute between the parties. From the facts that have been set out so far it can be seen that the basic dispute between the parties concerning the arbitration was as to the interpretation of cl 16, in particular whether the statute mentioned therein referred to the statute on arbitration of Hong Kong or of Malaysia. It was clear to me that the question was a serious question to be decided on the originating summons. It can also be seen from those facts and events that from the outset, PIE's stand was that the statute intended by cl 16 is the Malaysian statute and that at every subsequent opportunity they maintained that stand. It can also be seen that PIE filed their originating summons as soon as it was necessary to do so.

In submission on the injunction application, learned counsel for Maxson contended that PIE had been guilty of delay in applying for an interlocutory injunction. Although in their affidavit Maxson had not specifically charged PIE with the delay, so that PIE had not had an opportunity to specifically address the question of delay by affidavit, Maxson's counsel nevertheless submitted that the affidavits disclosed delay and did not disclose an explanation for the delay. The facts and events that follow, therefore, are set out also for the purpose of showing the position as regards the question of delay in applying for an interlocutory injunction.

A As has been seen, the originating summons was filed on 27 May 2000. That was soon after the arbitrator was appointed by the HKIAC and soon after PIE, in response to the arbitrator's request for proposals for the further conduct of the arbitration, and to Lovells' proposals for directions, said that they ought not to participate in the arbitration.

B On 29 May 2000, PIE's solicitors informed Lovells of the filing of the originating summons and asked them if they had instructions to accept service. On the same date, PIE's solicitors once again sent a copy of the originating summons to the arbitrator, saying that it would take two to three weeks to extract the sealed copy and that they would serve it on Maxson or their solicitors in due course. Also on the same date, PIE's solicitors wrote C another letter to the arbitrator in response to the arbitrator's letter dated 27 May 2001 which explained about the HKIAC's power to appoint an arbitrator. PIE's solicitors said that they still contended that cl 16 referred to the Malaysian statute.

The arbitrator did issue the directions as he had said he would in his D letter dated 27 May 2000. He did so on 1 June 2000 by order for directions no 1.

PIE lost no time in applying for an injunction. On 2 June 2000, they filed three matters. One was an application for an ex parte injunction to restrain Maxson from proceeding with the arbitration. Another was an application for leave to serve their originating summons outside the E jurisdiction. The third was a writ to claim damages from Maxson for their alleged delay in completing the project. They claimed a sum of HK$34,666,195.71 and general damages.

On 14 June 2000, leave to serve the originating summons outside the jurisdiction was given. On that date also, the originating summons was F issued. 2 October 2000 was given as the hearing date.

On 21 June 2000, the application for the ex parte injunction was withdrawn on the ground, as I understand the endorsements in the court file, that there was no jurisdiction to issue an ex parte injunction to have force outside the jurisdiction.

G On 14 August 2000, PIE served their counterclaim in the arbitration on Maxson. They counterclaimed for HK$39,287,059.17 and general damages. It was served 'under protest and without waiver of our rights to object on the question of jurisdiction'. That was according to a letter that the arbitrator was to write on 4 April 2001 to Maxson. I refer to the first paragraph on the second page. I shall come to this letter at the proper time.

H On 2 October 2000, the hearing of the originating summons was postponed to 7 November 2000 because it had not been served on Maxson outside the jurisdiction. On 7 November 2000, the hearing was postponed again to 12 February 2001 on the ground that Wisma Putra required one to two months to serve the originating summons.

I On 3 December 2000, PIE's solicitors wrote to the arbitrator about the date for the arbitration. Apparently March 2001 had been fixed or suggested. PIE's solicitors suggested that it be deferred to June 2001

because counsel would not be available before that. On 11 December 2000, the arbitrator wrote to Lovells to say that to accommodate PIE's counsel, a hearing for two weeks commencing on 30 April 2000 would be possible. It is to be noted that whether the hearing of the arbitration is in March or April, it would be after 12 February 2001, the date of hearing of the originating summons. If the originating summons were decided in PIE's favour on that date, there would be no necessity for an interlocutory injunction to restrain the arbitration.

On 9 February 2001, the originating summons was served on Maxson. On 12 February 2001, the hearing of the originating summons was postponed to 27 March 2001 because proof of service on Maxson had not come in.

On 23 February, the arbitrator issued an invoice for HK$24,000 for his attendances in 2000 and January 2001. Each party had to pay HK$12,000.

On 27 March 2001, Maxson appeared for the first time, by counsel, on the originating summons. Hearing was postponed to 25 July 2001 to enable PIE to respond to two affidavits that Maxson had filed recently.

Now 25 July 2001 would have been after the April dates for the arbitration. PIE would have to do something so that the arbitration would not proceed before the originating summons was decided, as otherwise the purpose of the originating summons would be defeated.

What PIE did was to write a letter on 28 March 2001 in which they said that it 'was only prudent to allow the Kuala Lumpur High Court to determine the issue of jurisdiction before commencement of arbitration proceedings' and they impliedly invited Maxson and the arbitrator to adjourn the arbitration hearing '*sine-die* until disposal of the originating summons'. That letter of PIE's dated 28 March was not pointed out to me, but I learnt of it and of what was said in it as set out just now from a letter that the arbitrator was to write to Maxson on 4 April 2001, which I have mentioned earlier and to which I shall come later. It is in the third and fourth paragraphs on the second page.

Also, on 28 March 2001, the arbitrator proposed draft directions so that the arbitration could be brought on for hearing and sought submissions on the proposed directions by 30 March 2001 (this was to be said by the arbitrator in their same letter to Maxson dated 4 April 2001, fifth paragraph, second page). From the second paragraph of a letter dated 17 April 2001 that the arbitrator was to write to Maxson and PIE's solicitors, which I shall come to in due course, it would appear that directions had been given or proposed fixing a two week oral hearing to commence on 14 May 2001, before the date of hearing of the originating summons. Those might have been part of the draft directions of the arbitrator of 28 March 2001.

On 29 March 2001, Maxson wrote to the arbitrator, probably in response to PIE's letter of 28 March 2001. Maxson in effect disagreed to PIE's request for an adjournment. Among the things Maxson said in their letter that PIE had caused delays in the arbitration proceedings.

A On 2 April 2001, the arbitrator issued an invoice for HK$250,000 being 'security for fees for the hearing'. Each party had to pay HK$125,000. On the same day, PIE's solicitors received a reminder of the earlier invoice for HK$24,000, Maxson having paid their share of HK$12,000 on 26 March. So PIE had HK$137,000 to settle with the arbitrator.

B On 3 April 2001, PIE's solicitors wrote to the arbitrator referring to 'the latest series of letters' from Maxson and the arbitrator, which, from the contents proper of the letter, appears to be a reference to the arbitrator's letter of 28 March 2001, proposing draft directions and Maxson's letter of 29 March 2001 which, among other things, said that PIE had caused delays in the arbitration.

C As to delay, PIE's solicitors said that the delay so far was equally due to Maxson. As to the arbitrator's draft directions, this was what they said, after clarifying that the adjournment that they had proposed was only up to 25 July 2001, the date of hearing of the originating summons, and not 'some undetermined date in the faraway future':

D > We do know that if there is a High Court hearing which will affect any issues being litigated before an arbitration tribunal, any Malaysian arbitration will adjourn the arbitration proceedings in deference to the High Court hearing. Can we expect the same deference to be shown by a Hong Kong arbitrator towards our Malaysian High Court, bearing in mind that the claimant in your arbitration proceedings is now actively participating in the Malaysian High E Court hearing and that any decision by our Malaysian High Court can be registered with your Hong Kong High Court and be binding on any Hong Kong arbitration proceedings? Your opinion and reasons shall be most appreciated before we take any further steps under your Practice Directions.

They also said that the hearing date of 14 May 2001 for the arbitration was F not suitable to them because their counsel would be tied up in the Malaysian courts in May and June 2001. They said that they would be ready to proceed with the arbitration from 30 July 2001 until 14 August 2001 should this court decide (on 25 July 2001) that the venue for the arbitration is Hong Kong.

Clearly, at this stage, PIE were still striving by persuasion to have the G arbitration heard after the determination of the originating summons.

On 4 April 2001, the arbitrator wrote to Maxson and PIE's solicitors the letter that I have mentioned several times. It referred to the letter of PIE's solicitors of 3 April 2001, which the arbitrator said was a letter 'enquiring whether this arbitration should be deferred as a matter of H 'deference' to the High Court in Malaysia'. The arbitrator considered that the question was put 'in unfortunately pejorative terms, and appears to misunderstand my obligations to deal with the arbitration'. The arbitrator then proceeded to set out the events that had taken place in the progress of the arbitration, some of which I have already related, with a view to giving an 'elucidation' of 'the present position, and the reasoning behind my I directions'. In the course of setting out the events, he said that in proposing the draft directions on 28 March 2001, 'I was entirely conscious of the fact that delay had been mutual'. The arbitrator said that what he was

'attempting to fulfil' was 'a general obligation of an arbitral tribunal to proceed with due diligence, so as to bring the arbitration to a conclusion in a manner which avoids unnecessary delay and expense, while allowing the parties a reasonable opportunity to present their cases'. The letter ended with these paragraphs:

> As for the hearing, this is a matter for the parties to consider. If the hearing proceeds in Hong Kong in advance of the OS in Malaysia, and an award is rendered, it may become nugatory by reason of the Malaysian proceedings. This of course affects both the claim and the counterclaim. By contrast, to adjourn the hearing until resolution of the OS might mean a lengthy adjournment, particularly if there were any further adjournment of the OS, or if any decision given were made the subject of an appeal. Such delay itself may be unnecessary if the court in Malaysia declines to make the declarations sought.
>
> The respondent has proposed the hearing to be deferred until 30 July 'should the court in Malaysia decide the venue to be in Hong Kong'. I regret to say this (still uncertain) date is not possible due to my own unavailability after 3 August, as well as for the reasons referred to above regarding the 'determination' of the OS. Were the hearing to be deferred to a date later than the hearing of the OS, then the earliest available commencement date in my diary would be 8 October.
>
> I have set out the present position as it is known to me at some length to indicate to the parties why directions have been issued as they have been, and to indicate at least some of the possible ramifications of adhering to, or deferring the hearing date. Without in any way derogating from the directions which have been given for the preparation for the hearing, may I now invite each of you again to consider the position.

What, to my understanding of those paragraphs, was meant was that to the arbitrator, the directions he had given for the hearing of the arbitration, including probably the date of hearing, still stood, but he was leaving it to the parties to consider whether to adjourn the hearing until the resolution of the originating summons, but were the hearing to be deferred to a date later than 27 May 2001, then according to his diary the earliest available commencement date would be 8 October 2001.

Maxson replied directly on the same day, 4 April 2001. To them what PIE had been doing was 'purely to delay, disrupt and disjoint this arbitration to the point of bringing it to a standstill'. Their stand was to 'strenuously insist on the latest orders for direction to be adhered to rigorously, and that no more delays or excuses from the respondent will be considered'.

PIE's solicitors, possibly thinking that the arbitrator was amenable to postponing the arbitration to 8 October 2001, responded on 13 April 2001 by confirming that PIE's 'witness and counsel' would be present on that date 'as proposed in your said letter'. In a way, PIE's solicitors, in my view, could not be faulted entirely for so thinking. By leaving it to the parties to consider the question of adjournment of the arbitration, the arbitrator might be understood to be holding out the possibility of there being an adjournment, in which event the earliest date for the arbitrator would be

8 October 2001. It might be reasoned that if there was going to be no possibility of an adjournment, it was pointless for the arbitrator to ask the parties to consider the question, and the arbitrator could simply, in his letter of 4 April 2001, have refused to consider an adjournment and have insisted on proceeding on 14 May 2001.

On 17 April 2001, the arbitrator responded to the letter of PIE's solicitors dated 13 April 2001 after receiving a letter from Maxson dated 16 April 2001. I am unable to say what Maxson said in their letter because the letter was not pointed out to me in submission. Referring to the date 8 October 2001, which PIE's solicitors had said was proposed by the arbitrator, the arbitrator said this:

> As I believe is abundantly clear from my letter of 4 April, I was making no such proposal. The directions which have been given are that a two week oral hearing is fixed to commence on 14 May 2001. My letter of 4 April did no more than indicate the quite extensive delay which would be incurred if the various dates proposed earlier by me were not met.

That statement disregarded the fact that the letter in question also left it to the parties to consider whether the hearing of the arbitration ought to be adjourned until after the resolution of the originating summons.

The arbitrator also mentioned PIE's failure to pay the fees-security of HK$125,000, which he said was required to be paid by 12 April 2000, and said: 'Accordingly it appears to be the case that [Maxson] intends to proceed with the hearing, but [PIE] does not'. The letter ended with this paragraph:

> For the avoidance of any possible misunderstanding therefore I would like the parties to clearly understand that, unless the position changes in some material respect, I will proceed to hear the claimant on its claim, with or without the presence of the respondent at the hearing scheduled for the 14 May. If a venue requires to be reserved, the claimant is put this in hand.

Thus, the leaving of the question of adjournment to the parties to consider ended with the arbitrator deciding to proceed with the hearing of the arbitration as scheduled. PIE could no longer hope to prevail upon the arbitrator to stay the hearing of the arbitration until after the disposal of the originating summons.

On the same day, 17 April 2001, Maxson arranged with the HKIAC for the booking of the arbitration room to be changed to the period 15 May 2001 to 26 June 2001. Thus the arbitration hearing would proceed on 15 May 2001.

On 27 April 2001, that is ten days after the final decision of the arbitrator and seventeen days before the scheduled hearing of the arbitration, PIE filed a second application for an ex parte interlocutory injunction to restrain Maxson from proceeding with the arbitration, and on 15 May 2001, the date of commencement of the arbitration, I granted the ex parte injunction. This was followed by the filing of the inter partes application, which I allowed on 12 June 2001 after hearing and considering arguments.

I deal straightaway with the submission that PIE had delayed in applying for the interlocutory injunction. As I said, although this was not specifically raised in affidavit, Maxson's counsel submitted that the delay was disclosed in the affidavits.

The purpose of the interlocutory injunction was to ensure that the arbitration did not commence until the originating summons was decided. The facts and events that I have set out show that as soon as PIE filed the originating summons, they filed the first ex parte application for an interlocutory injunction, but this was withdrawn because it was thought that there was no jurisdiction to issue an ex parte injunction to have force outside the jurisdiction. After that, PIE's concern was to see that the date of hearing of the arbitration was not earlier than the date of hearing of the originating summons, but when the date of hearing of the arbitration came to be earlier than the date of hearing of the originating summons, PIE attempted to prevail upon the arbitrator and Maxson to agree to an adjournment of the hearing of the arbitration. In the meantime, PIE had, under protest and while objecting to the Hong Kong venue for the arbitration and to the appointment of the arbitrator, to take part in the arbitration by, for example, filing their statement of defence and counterclaim because if they failed to do so they would be prejudiced in the arbitration should they fail on their originating summons. It was only when they saw no hope for an adjournment from the arbitrator that they filed their second application for an ex parte interlocutory injunction. They did that soon enough after the arbitrator's final decision.

It was not unreasonable on PIE's part to hope for an adjournment from the arbitrator. As the arbitrator himself said in his letter of 4 April 2001, 'If the hearing proceeds in Hong Kong in advance of the OS in Malaysia, and an award is rendered, it may become nugatory by reason of the Malaysian proceedings'. It was not unreasonable on PIE's part to expect that prudence would prevail to dictate a decision in favour of having the originating summons decided first. But Maxson saw it as their right not to have the resolution of their claim delayed and the arbitrator felt it his duty to expedite the arbitration.

The facts show that PIE acted to obtain an injunction as soon as it appeared to be necessary to do so. In that light, there was no delay on their part.

Another point was raised by Maxson's counsel in submission. She submitted that PIE, by taking part in the arbitration, such as by filing their statement of defence and counterclaim, had consented to arbitration in Hong Kong and the jurisdiction of the arbitrator, and were therefore precluded from restraining the arbitration in Hong Kong. But, as has been seen, PIE's participation was under protest and was a necessity to protect their interests. Their participation cannot be construed as consent to the arbitration in Hong Kong or the appointment of the arbitrator.

In his submission, PIE's counsel said that if the injunction was not granted, and the arbitration proceeded, the originating summons would be rendered nugatory and PIE, were they to succeed on the originating

summons, would be deprived of their right to have the arbitration conducted in Malaysia in accordance with Malaysian law. A reason stated in submission for preferring arbitration in Malaysia was that it would be very expensive to have the arbitration in Hong Kong. Reference was made to certain exhibits that gave an idea of the expensiveness of arbitration in Hong Kong. Reference was also made to the demand for the payment of HK$125,000 security for the arbitrator's fees, which PIE had not made, as a result of which the arbitrator had stayed PIE'S defence and counterclaim. In their affidavit in support of their inter partes application, PIE said that in arbitration proceedings in Malaysia, except for a RM5,000 deposit, the arbitrator's fees are only paid at the conclusion of the hearing when the parties collect the written award from the arbitrator. PIE said that their not being allowed to proceed with their claim and counterclaim unless they paid the arbitrator the total sum of HK$137,000 (RM68,500) was oppressive. They said that if the injunction were not granted, and they had paid the sum in order to be able to advance their claim and counterclaim, and subsequently they succeeded on their originating summons, it would be unlikely that they would be able to obtain a refund.

As to the manner in which any orders on the originating summons and on the interlocutory injunction application would be effective against Maxson, PIE's counsel submitted that they would bind Maxson because they were represented in Malaysia. If Maxson, in defiance of the orders, proceeded with the arbitration in Hong Kong, they would be in contempt and would not be able to register in Malaysia for enforcement any award that they might obtain in the arbitration. They would also be unable to contest PIE's writ.

That was actually an answer given in advance to one of the three grounds that Maxson's counsel was, in his reply, to rely on for arguing that the originating summons had no prospect of succeeding and that there was no serious question to be tried. That ground was that the declaratory orders that PIE sought in the originating summons were not capable of being enforced because to enforce them PIE would have to register them in Hong Kong and that could not be done because under s 3(2) of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) of Hong Kong, only monetary judgments could be registered.

The other ground was that if the originating summons was allowed, there would be in Malaysia both an arbitration and PIE's writ action. But that would not be a good ground for not allowing the originating summons. If there was to be arbitration in Malaysia, the writ action could be withdrawn or stayed.

The third ground was that PIE should have brought in Hong Kong their challenge to the arbitrator's jurisdiction. It was, however, not shown why in law PIE could not equally in Malaysia seek the declarations that they were seeking by their originating summons.

As I have said earlier, there was, in my opinion, a serious question to be tried as to the effect of cl 16 on the question of the venue of arbitration and the governing law.

As to balance of convenience, Maxson's counsel submitted that arbitration in Malaysia was not more convenient or inexpensive than arbitration in Hong Kong. I disagreed. In my judgment, the balance of convenience clearly lay in favour of granting the injunction. I accordingly granted the injunction.

Application allowed.

Reported by Peter Ling